8-14-2014

State v. Jones Appellant's Brief Dckt. 41872

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JAMES EDWARD JONES, Defendant-Appellant.	NO. 41872 ADA COUNTY NO. CR 2013-12667 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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Nature of the Case

Pursuant to a plea agreement, forty-year-old James Edward Jones pleaded guilty to felony domestic violence in the presence of a child and felony intimidating a witness. The district court essentially imposed a unified sentence of fifteen years, with five years fixed. The district court also entered an amended no contact order prohibiting Mr. Jones from contacting the victim or his daughter until 2024. Mr. Jones filed a motion to modify the amended no contact order, and an Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion for a reduction of sentence, but the district court denied both motions.

On appeal, Mr. Jones asserts that the district court abused its discretion when it denied his motion to modify the amended no contact order, when it essentially imposed a unified sentence of fifteen years, with five years fixed, and when it denied his Rule 35 motion.

Statement of the Facts and Course of Proceedings

Officer Ellsworth with the Garden City Police Department went to St. Luke's Hospital in Meridian in response to a domestic battery report. (Presentence Report (*hereinafter*, PSI), p.3.) At the hospital, Christina August related that about four days earlier, she had told her partner Mr. Jones that she was going to leave him and take their one-year-old daughter L.J. with her. (PSI, p.3; *see* PSI, p.11.) Mr. Jones then reportedly kicked her near the thigh, yelled at her, kicked her in the ribs, pushed her down on the bed in her bedroom, punched her in the head twice with a closed fist, and restrained her on the bed. (PSI, p.3.) Ms. August had two broken ribs. (PSI, p.3.) She also stated that L.J. had been present during the incident. (PSI, p.3.)

The State filed a Complaint alleging that Mr. Jones had committed the crimes of domestic violence in the presence of a child, felony, in violation of Idaho Code §§ 18-903(a), 18-918(2), and 18-918(4), and attempted strangulation, felony, in violation of I.C. § 18-923. (R., pp.5-6.) The magistrate issued a no contact order prohibiting Mr. Jones from any contact with Ms. August., L.J., or E.B. (another minor child) until September 11, 2015 or the dismissal of the case, whichever occurred first. (R., p.9.)

Mr. Jones then wrote a letter addressed to his sister. (PSI, p.4; *see* PSI, pp.76-77.) Ms. August told the authorities that the letter was actually meant for her. (PSI, p.76.) The letter stated that Mr. Jones hoped that the addressee would not show up in court, and that the addressee would recommend that Mr. Jones be placed in Domestic Violence Court. (PSI, pp.4, 86.)

Later, the State filed an Amended Complaint alleging that Mr. Jones had committed the crimes of felony domestic violence in the presence of a child, felony attempted strangulation, and intimidating, impeding, influencing, or preventing the attendance of a witness, felony, in violation of I.C. § 18-2604. (R., pp.19-21.) After Mr. Jones waived a preliminary hearing, the magistrate bound him over to the district court. (R., p.25.) The State then filed an Information charging Mr. Jones with the above three offenses. (R., pp.28-29.) Mr. Jones subsequently filed a motion to modify the no contact order, requesting that the district court allow contact between Mr. Jones and L.J. (*See* R., pp.34-35.)

Mr. Jones then agreed, pursuant to a plea agreement, to plead guilty to felony domestic violence in the presence of a child and felony intimidating a witness. (*See* R., p.41; Tr., p.4, Ls.16-18.) In exchange, the State would dismiss the felony attempted strangulation charge and refrain from filing a Part II of the Information charging

Mr. Jones with a persistent violator sentencing enhancement. (See R., pp.41-42, 48; Tr., Nov. 1, 2013, p.5, Ls.23-24.) The State would recommend an underlying unified sentence of fifteen years, with five years fixed. (R., p.41; Tr., Nov. 1, 2013, p.5, Ls.8-9.) If Mr. Jones were deemed to be amenable to treatment and a low to moderate risk to reoffend, the State would cap its recommendation at a retained jurisdiction "rider" program. (R., p.41; Tr., Nov. 1, 2013, p.5, Ls.9-13.) If Mr. Jones were deemed to not be amenable to treatment, or a high risk to reoffend, the State would be free to argue for imposition of the sentence, and Mr. Jones would be free to argue for less. (R., p.41; Tr., Nov. 1, 2013, p.5, Ls.14-17.) The district court accepted Mr. Jones's guilty pleas. (R., p.41; Tr., Nov. 1, 2013, p.12, L.17 – p.13, L.7.) The district court also ordered Mr. Jones to undergo a domestic violence evaluation pursuant to I.C. § 18-918(7)(a). (R., pp.52-54.) Additionally, the district court denied the motion to modify the no contact order. (R., p.40; Tr., Nov. 1, 2013, p.13, L.17 – p.17, L.5.)

The presentence report stated that Mr. Jones had an aggregate LSI-R score of 41, "which places him in the High Risk category." (PSI, pp.15-16.) Mr. Jones's Domestic Battery Evaluation, prepared by Tom Wilson, MA, LCPC, stated that Mr. Jones's "profile falls in the high risk range for re-offending." (PSI, pp.157, 174.)

At the sentencing hearing, the State, based on the results from the domestic violence evaluation, recommended that the district court essentially impose a unified sentence of fifteen years, with five years fixed. (R., p.56; Tr., Jan. 7, 2014, p.8, L.6 – p.9, L.1.) The State also requested a no contact order with Ms. August and L.J. (Tr., Jan. 7, 2014, p.9, Ls.4-9.) Mr. Jones recommended that the State impose a unified sentence of fifteen years, with one and one-half years fixed. (Tr., Jan. 7, 2014, p.20, Ls.1-11.)

The district court essentially imposed a unified sentence of fifteen years, with five years fixed. (Tr., Jan. 7, 2014, p.30, Ls.8-10.) Specifically, the district court imposed a unified sentence of ten years, with five years fixed, for the felony domestic violence in the presence of a child count, and a consecutive sentence of five years indeterminate for the felony intimidating a witness count. (R., pp.60-64.) The district court also entered an Amended No Contact Order, prohibiting Mr. Jones from contacting Ms. August or L.J. until after January 6, 2024. (R., p.57; Tr., Jan. 7, 2014, p.31, L.12 – p.32, L.1.)

Mr. Jones subsequently filed a Motion to Modify No Contact Order, requesting that the district court modify the Amended No Contact Order with respect to his minor child, L.J. (R., pp.66-67.) At the hearing on the motion to modify the amended no contact order, Mr. Jones clarified that he would prefer in-person visits with L.J. by way of a third person taking L.J. to the prison to visit him. (Tr., Feb. 19, 2014, p.6, L.24 – p.7, L.4.) At a minimum, Mr. Jones wanted to have contact with L.J. via phone, mail, or video. (Tr., Feb. 19, 2014, p.6, Ls.21-23.) The State argued against granting the motion, contending that L.J. had been a witness to Mr. Jones's violence against Ms. August and that L.J. was too young to be emotionally equipped to deal with contacting Mr. Jones. (R., p.71; Tr., Feb. 19. 2014, p.7, L.16 – p.8, L.10.)

The district court denied the motion to modify the amended no contact order. (R., p.71.) The district court "share[d] the concerns raised about contact or visitation at the correctional facility involving the child of this young lady's tender years." (Tr., Feb. 19, 2014, p.10, Ls.9-12.) The district court indicated that it would consider revisiting the no contact order if a family law court determined whether or not visitation were appropriate. (Tr., Feb. 19, 2014, p.10, Ls.16-24.)

Mr. Jones then filed a Notice of Appeal timely from the district court's Judgment and Commitment. (R., pp.72-74.)

Mr. Jones also filed a Motion for Reconsideration and for Leave, pursuant to Idaho Criminal Rule 35. (R., p.77.) Later, he filed an Addendum to Defendant's Motion Pursuant to ICR 35. (Addendum to Defendant's Motion Pursuant to ICR 35 (*hereinafter*, Addendum), Apr. 9, 2014.) The district court denied the Rule 35 motion.[1] (Order Denying Rule 35 Motion, June 16, 2014.)

[1] The Addendum and Order Denying Rule 35 Motion are the items attached to Mr. Jones's Motion to Augment the Record and Statement in Support Thereof, filed with this Appellant's Brief.

ISSUES

1. Did the district court abuse its discretion when it denied Mr. Jones's motion to modify the amended no contact order?

2. Did the district court abuse its discretion when it essentially imposed a unified sentence of fifteen years, with five years fixed, upon Mr. Jones following his guilty plea to felony domestic violence in the presence of a child and felony intimidating a witness?

3. Did the district court abuse its discretion when it denied Mr. Jones's Idaho Criminal Rule 35 Motion for a reduction of sentence?

ARGUMENT

I.

The District Court Abused Its Discretion When It Denied Mr. Jones's Motion To Modify The Amended No Contact Order

Mr. Jones asserts that the district court abused its discretion when it denied his motion to modify the amended no contact order, because the denial unconstitutionally interferes with Mr. Jones's fundamental right as L.J.'s parent.

"The decision whether to modify a no contact order is within the sound discretion of the district court." *State v. Cobler*, 148 Idaho 769, 771 (2010). When reviewing a discretionary decision by a district court, an appellate court conducts a multi-part inquiry into (1) whether the district court correctly perceived the issue as one of discretion; (2) whether the district court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the district court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

In this case, the district court abused its discretion when it denied the motion to modify the amended no contact order, because the denial unconstitutionally interferes with Mr. Jones's fundamental right as L.J.'s parent. While Mr. Jones did not raise this objection before the district court, it may be raised for the first time on appeal as fundamental error. *See State v. Perry*, 150 Idaho 209, 226 (2010).

> [I]n cases of unobjected to fundamental error: (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

Id.

Here, one of Mr. Jones's unwaived constitutional rights was violated, because the denial of the motion to modify the amended no contact order unconstitutionally interferes with his fundamental right as L.J.'s parent. The fundamental right to parent one's children is well established in Idaho. *See, e.g., State v. Doe*, 144 Idaho 534, 536 (2007); *Leavitt v. Leavitt*, 142 Idaho 664, 670 (2006). The liberty interest of "parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court. *Troxell v. Granville*, 530 U.S. 57, 65 (2000). The fundamental right to parent one's children "does not evaporate simply because they have not been model parents. . . . Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

The denial of the motion to modify the amended no contact order unconstitutionally interferes with this fundamental right of Mr. Jones. It interferes with his fundamental right as L.J.'s parent because the amended no contact order prohibits Mr. Jones from contacting L.J. until after January 6, 2024. (R., p.57.) Because the denial leaves in place the amended no contact order's absolute prohibition against Mr. Jones contacting L.J. until she will be fourteen years old (*see* R., p.57; PSI, pp.1, 11), the denial will irretrievably destroy his family life with her. *See Santosky*, 455 U.S. at 753. Thus, the denial interferes with Mr. Jones's fundamental right as L.J.'s parent.

This interference rises to an unconstitutional level because clear and convincing evidence does not support the denial of the motion to modify the no contact order. In *Santosky*, the United States Supreme Court held that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process

requires that the State support its allegations by at least clear and convincing evidence." *Santosky*, 455 U.S. at 747-48; *see State v. Doe*, 144 Idaho at 536. Because the denial of the motion to modify the amended no contract order means that Mr. Jones is prohibited from contacting L.J. during the bulk of her formative years, it effectively severs his rights as L.J.'s parent. Thus, Mr. Jones asserts that the *Santosky* due process standard should apply here.

Should this Court apply the *Santosky* due process standard to the district court's denial of the motion to modify the no contact order, clear and convincing evidence does not support the denial. Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain. In re *Doe*, 143 Idaho 188, 191 (2006). An appellate court reviews a decision requiring clear and convincing evidence to determine whether the decision is supported by substantial and competent evidence, meaning evidence that a reasonable mind might accept as adequate to support a conclusion. *Doe v. Doe*, 148 Idaho 243, 245-46 (2009). If the decision requires clear and convincing evidence (as opposed to a mere preponderance of the evidence), the substantial evidence test requires a greater quantum of evidence. In re *Doe*, 143 Idaho 343, 346 (2006).

Here, clear and convincing evidence does not support the district court's denial of the motion to modify the amended no contact order. While Mr. Jones was abusive towards Ms. August, the record does not show that he was directly abusive towards L.J. In fact, Mr. Jones counts L.J. as one of the most important parts of his life, and has the goal of getting the no contact order lifted so he can see her. (PSI, p.15.) Further, even if he cannot see her in person because visiting prison would not be appropriate for a child of L.J.'s current age, no clear and convincing evidence shows that Mr. Jones

should be similarly prohibited from contacting L.J. via phone, mail, or video. Thus, clear and convincing evidence does not support the denial of the motion to modify the amended no contact order.

Because clear and convincing evidence does not support the district court's denial of the motion to modify the amended no contact order, the denial does not meet the *Santosky* due process standard. *See Santosky*, 455 U.S. at 747-48. Thus, the denial of the motion to modify the amended no contract order unconstitutionally interferes with Mr. Jones's fundamental right as L.J.'s parent. *See id.* at 753. One of Mr. Jones's unwaived constitutional rights was violated.

The error here is clear and obvious. The amended no contact order explicitly states that Mr. Jones may not contact L.J. until 2024. (R., p.57.) Thus, it is clear that the denial of the motion to modify the no contact order unconstitutionally interferes with his fundamental right as L.J.'s parent. There is no need for "any additional information not contained in the appellate record." *See Perry*, 150 Idaho at 226. Further, because the denial does unconstitutionally interfere with Mr. Jones's fundamental right as L.J.'s parent, it cannot be said that the failure to object on this basis was a tactical decision by the defense. *Cf. State v. Adams*, 147 Idaho 857, 860-62 (Ct. App. 2009) (holding that the failure to exclude a juror may have been a tactical decision by the defense, because the record did not clearly show that the juror would be biased against the defendant).

The error is also not harmless because it affected Mr. Jones's substantial rights. It affected his substantial rights because the error affected the outcome of whether the district court would modify the no contact order. *See Perry*, 150 Idaho at 226. Had the district court recognized that the denial would unconstitutionally interfere with Mr. Jones's fundamental right as L.J.'s parent, it conceivably would have granted the

motion to modify the amended no contact order to avoid violating one of Mr. Jones's unwaived constitutional rights. Thus, the error is not harmless.

In sum, the district court abused its discretion when it denied his motion to modify the amended no contact order, because the denial unconstitutionally interferes with Mr. Jones's fundamental right as L.J.'s parent. This issue may be raised as fundamental error because the denial clearly violated one of Mr. Jones's unwaived constitutional rights and affected his substantive rights. The district court's order denying the motion to modify the amended no contact order should be vacated, and the case remanded to the district court with instructions to allow contact between Mr. Jones and L.J., with the specific constraints to be determined by the district court.

II.

The District Court Abused Its Discretion When It Essentially Imposed A Unified Sentence Of Fifteen Years, With Five Years Fixed, Upon Mr. Jones Following His Guilty Plea To Felony Domestic Violence In The Presence Of A Child And Felony Intimidating A Witness

Mr. Jones asserts that the district court abused its discretion when it imposed his sentence, because the sentence is excessive considering any view of the facts. As discussed above, the district court essentially imposed a unified sentence of fifteen years, with five years fixed, through imposing a unified sentence of ten years, with five years fixed, for the felony domestic violence in the presence of a child count, and a consecutive sentence of five years indeterminate for the felony intimidating a witness count. (R., pp.60-64.)

Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record

giving "due regard to the nature of the offense, the character of the offender, and the protection of the public interest." *State v. Strand*, 137 Idaho 457, 460 (2002).

The Idaho Supreme Court has held that, "[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence." *State v. Jackson*, 130 Idaho 293, 294 (1997) (internal quotation marks omitted). Mr. Jones does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Jones must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* An appellate court, "[w]hen reviewing the length of a sentence . . . consider[s] the defendant's entire sentence." *State v. Oliver*, 144 Idaho 722, 726 (2007). The reviewing court will "presume that the fixed portion of the sentence will be the defendant's probable term of confinement." *Id.*

Mr. Jones submits that, because the district court did not give adequate consideration to mitigating factors, the sentence imposed by the district court is excessive considering any view of the facts. Specifically, the district court did not adequately consider Mr. Jones's difficult childhood. When Mr. Jones was an infant, his biological mother dropped him off with his stepfather. (PSI, p.210.) His biological mother was a drug addict, and Mr. Jones had been malnourished. (PSI, p.210.) Mr. Jones's stepfather reported that Mr. Jones had been almost starved to death, and that it took almost six months to build up his energy to the point where he was normally alert. (PSI, p.361.) Mr. Jones, who lived with his stepfather until he was sixteen years

old, reported that his stepfather was physically and mentally abusive. (PSI, pp.210, 360.) When he was fourteen years old, he briefly went to live with his biological mother, but he reported that his biological mother then sexually molested him. (PSI, p.210.) Mr. Jones also reported using school as an escape from his stepfather's abuse, and that he would start fights at school after his stepfather hit him. (PSI, p.360.) Adequate consideration of Mr. Jones's difficult childhood should have led to a lesser sentence.

Additionally, the district court did not adequately consider Mr. Jones's mental health issues. A district court must consider evidence of a defendant's mental condition offered at the time of sentencing. *See* I.C. § 19-2523(1). Mr. Jones has issues with anxiety, controlling his anger, and other mental health concerns. His GAIN-I evaluation reflects that Mr. Jones self-reported symptoms consistent with the diagnosis of a mood disorder and generalized anxiety disorder. (PSI, p.33.) In 2003, Mr. Jones was admitted to Intermountain Hospital for anger issues and increased panic attacks. (PSI, pp.214-15.) He was diagnosed with antisocial personal disorder, bipolar disorder, and likely attention deficit disorder. (PSI, p.215.) Later in 2003, he was again admitted to Intermountain Hospital, this time for suicidal ideation, and was diagnosed with bipolar affective disorder. (PSI, p.215.) He also reported being admitted to Intermountain in 2007. (PSI, p.160.) Adequate consideration of Mr. Jones's mental health issues should have resulted in a lesser sentence.

The district court also did not adequately consider Mr. Jones's substance abuse problems. The Idaho Supreme Court has recognized substance abuse as a mitigating factor in cases where it found a sentence to be excessive. *See, e.g.*, *State v. Nice*, 103 Idaho 89, 91 (1982). Mr. Jones has a long history of struggle with substance abuse. He was diagnosed with amphetamine dependence, cannabis dependence, and opoid

dependence in his GAIN-I evaluation. (PSI, p.30.) He was also diagnosed with methamphetamine abuse in 2003. (PSI, p.30.) He began using marijuana and alcohol at age fifteen, methamphetamine at age twenty-six, and synthetic cannabinoids at age thirty-three. (PSI, p.14.)

For a while, Mr. Jones had been managing his substance abuse problems. After being placed on probation in 2011, he reported that he used marijuana almost daily. (PSI, p.14.) However, he then started taking medication from Access Behavioral Health, and sharply reduced his marijuana use to about once a month or less. (PSI, p.14.)

Unfortunately, Mr. Jones relapsed, which contributed to the instant domestic violence offense. About three months before the offense, Mr. Jones stopped taking his medication and began smoking marijuana daily. (PSI, p.14.) He also began using methamphetamine again for the first time in six years, smoking it daily and then eventually using it intravenously. (PSI, pp.14, 159.) Mr. Jones stated that he started using methamphetamine together with Ms. August. (PSI, p.10.) He reported using methamphetamine cut with bath salts. (PSI, p.14.) Mr. Jones stated that he last used methamphetamine on or around the day of the offense, or about four days before his arrest. (*See* PSI, pp.3, 14.) In the domestic battery evaluation, Mr. Jones stated that he was unable to calm down after Ms. August told him she was leaving with L.J. because of his heavy methamphetamine use. (PSI, p.158.) He had been awake for a couple days. (PSI, p.6.) He also reported that he did not remember most of what happened the night of the incident because he blacked out. (PSI, p.158.)

Mr. Jones wants treatment for his substance abuse problems. Despite his long struggle with substance abuse, at his GAIN-I evaluation he reported no history of

substance abuse treatment. (PSI, p.32.) His counsel stated at the sentencing hearing that Mr. Jones "indicates that he did a rider back in 1992, but other than that he really hasn't had intensive treatment that he is so desperately asking the Court to give him." (Tr., Jan. 7, 2014, p.19, Ls.21-24.) Mr. Jones now admits that he has a drug problem, and he wants to participate in treatment to help him remain drug-free. (PSI, p.14.) At the sentencing hearing, Mr. Jones's counsel told the district court that Mr. Jones "desperately wants to get a handle on his addiction and his anger issues. And by no means is he saying that because he is an addict that it is okay for him to be angry and to commit the offenses that he has committed." (Tr., Jan. 7, 2014, p.19, Ls.5-12.) Mr. Jones "wants to better himself not only for himself, but also this little girl who is growing up who is his daughter." (Tr., Jan. 7, 2014, p.19, Ls.5-12.)

Mr. Jones has a long history of struggle with substance abuse, and his substance abuse problems contributed to the instant domestic violence offense. But Mr. Jones also now admits that he has a drug problem, and wants substance abuse treatment. Adequate consideration of Mr. Jones' substance abuse problems should have led to a lesser sentence.

Because the district court did not adequately consider the above mitigating factors, the sentence imposed is excessive considering any view of the facts. Thus, the district court abused its discretion when it imposed Mr. Jones's sentence.

III.

The District Court Abused Its Discretion When It Denied Mr. Jones's Idaho Criminal Rule 35 Motion For A Reduction Of Sentence

Mr. Jones asserts that the district court abused its discretion when it denied his Rule 35 motion for a reduction of sentence, in view of new and information presented to

the district court. "A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe." *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994) (citation omitted). "The denial of a motion for modification of a sentence will not be disturbed absent a showing that the court abused its discretion." *Id.* "The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable." *Id.* "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction." *Id.*

Mr. Jones asserts that his sentence is excessive in view of new and additional information presented with the motion for reduction. Specifically, the new and additional information shows that Mr. Jones continues to desire treatment and has taken steps to better his situation. (*See* Addendum.) Mr. Jones wrote that he was in Dealing with Schizophrenia, Relapse Prevention, and Anger Management courses, and that he was working in the kitchen. (Addendum, p.2.) He was signed up for a future Alternative to Violence class. (Addendum, p.2.)

The offender concern forms, or "kites," submitted with his Addendum to Defendant's Motion Pursuant to ICR 35, also show that Mr. Jones continues to desire treatment and has taken steps to better his situation. The kites reflect that Mr. Jones was interested in signing up for Anger Management courses, that he completed a self-help workbook, and that he was participating in the Dealing with Schizophrenia group course. (Addendum, pp.4-6.) The kites also show that Mr. Jones was willing to "work any position and at any time to get my foot in the door." (Addendum, p.3.)

The new and additional information presented with the motion for reduction shows that Mr. Jones continues to desire treatment and has taken steps to better his situation. Mr. Jones' sentence is excessive in view of this new and additional information. Thus, the district court abused its discretion when it denied his Rule 35 motion for a reduction of sentence.

CONCLUSION

For the above reasons, Mr. Jones respectfully requests that this Court vacate the district court's order denying his motion to modify the amended no contact order and remand his case to the district court with instructions to allow contact between Mr. Jones and L.J., with the specific constraints to be determined by the district court. Alternatively, he requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that this Court remand his case to the district court for a new sentencing hearing.

DATED this 14th day of August, 2014.

BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of August, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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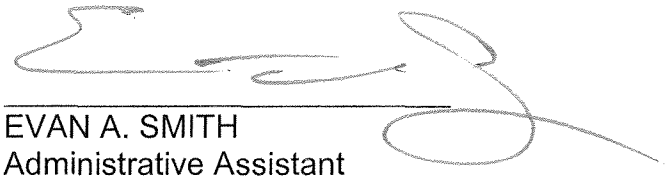

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